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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON, EDWARD C. SCHMULTS AND CAROL E. DINKINS,
Appellees.

On Appeal From The United States Court of Appeals For The District Of Columbia Ciruit

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BRIEF OF MICHAEL K. DEAVER AS *AMICUS CURIAE* IN SUPPORT OF THE APPELLEES

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BRIEF OF MICHAEL K. DEAVER AS AMICUS CURIAE IN SUPPORT OF THE APPELLEES

STATEMENT OF INTEREST

Amicus curiae Michael K. Deaver ("Mr. Deaver") is the very first individual to be indicted, tried and convicted as a result of proceedings conducted by an Independent Counsel. Both before and after his indictment, Mr. Deaver brought legal challenges to the power of the Independent Counsel to proceed against him, raising as grounds for these challenges the same attacks on the constitutionality of the statute that are at issue in this case. Although the district court denied these challenges, the issues they raised have been fully preserved for appellate review. The resolution of these issues here, therefore, may have a direct impact on the status of Mr. Deaver's case.

In addition, the *Deaver* case demonstrates all too well the dangers of unleashing upon an individual citizen the unaccountable exercise of power by an independent counsel appointed by the court of ap-

peals in the jurisdiction in which that individual ultimately is brought to trial. Public figures may be fair game in the press and before congressional committees, but they are entitled under the Constitution to criminal process free from the taint of politics, conflicts of interest by those who prosecute them, and the appearance of partiality by the courts before which they are tried. Contrary to the assertions of *amicus curiae* Whitney North Seymour, Jr., Mr. Deaver enjoyed none of these hallmarks of our criminal justice system under the dual system of justice created by the Act.

SUMMARY OF ARGUMENT

The independent counsel provisions of the Ethics in Government Act ("the Act") violate Articles I, II and III of the Constitution and the principles of separation of powers those Articles incorporate, both by distorting the balance of power among the several branches, and by inviting abuses of our nation's prosecutorial power in individual cases brought under the Act.

The investigation and prosecution of criminal offenses are functions at the core of the executive power, which Article II of the Constitution delegates exclusively to the President. The Act, however, divests the President and his agents of their power to perform or supervise the performance of these functions, while simultaneously granting portions of that power to the Special Division of the Court of Appeals and to the Congress, and transferring the remainder to a person unaccountable to any of the coordinate branches, in violation of Articles I, II and III of the Constitution.

The Act further distorts the constitutional system of separated powers by 1) providing for judicial appointment of independent counsel; 2) preventing the President from removing independent counsel at will; and 3) granting the Special Division of the Court of Appeals independent authority to terminate an independent counsel's office.

Together, these features of the statute reflect a conscious design to usurp core executive power from the Executive Branch and to

transfer it to an individual who is accountable only to the Judicial and Legislative branches, or to no one at all. Such a reallocation of constitutional authority by Congress, no matter how assertedly expedient a response to the purported ills of Watergate, is impermissible under the form of government established by our Constitution. In its recent operation, moreover, the Act has proved to be a "cure" far more dangerous to the public interest and the rights of individual citizens than the supposed ills it was intended to remedy, underscoring once again the need for this Court to exercise its constitutional obligation to restore and preserve the proper balance of power among the coordinate branches, and "to preclude the exercise of arbitrary power." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

ARGUMENT

I. THE ACT DEPRIVES THE PRESIDENT OF HIS EXCLUSIVE AUTHORITY TO EXERCISE CORE EXECUTIVE POWER.

The Framers' decision to vest in a single official the full power and duty to see to the execution of the laws reflects a conscious preference for a unitary and energetic executive with the authority necessary to ensure "steady administration of the laws." *The Federalist* No. 70, at 423 (A. Hamilton) (C. Rossiter ed. 1961). The executive authority conferred on the President by Article II, § 3, is the power "to implement the legislative mandate." *Bowsher v. Synar*, 106 S. Ct. 3181, 3192 (1986). Central to this power is the authority to prosecute civil and criminal litigation. The centrality of these law enforcement and prosecutorial functions to the task of executing the laws, together with the explicit textual commitment of that task to a single individual, the President, necessarily implies that the President must have the power to direct those officers who actually carry out the enforcement of the laws.

Early in our Nation's history, Attorney General (later Chief Justice) Roger B. Taney reached precisely this conclusion in his opinion

regarding *The Jewels of the Princess of Orange*, 2 Op. Atty. Gen. 482 (1831). The issue in *Jewels* was whether the President could order a United States district attorney to halt a prosecution. Taney answered in the affirmative, reasoning that the President's authority to direct a district attorney in the performance of his duties "derived from the general supervisory powers which belong to his office, and which are necessary to enable him to perform the duty imposed upon him, of seeing that the law is faithfully executed." *Id.* at 488. Chief Justice Taft reiterated Taney's conclusion a century later in *Myers v. United States*, 272 U.S. at 135:

> The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which article 2 of the Constitution evidently contemplated in vesting general executive power in the President alone.[1]

The Ethics in Government Act forecloses direction of an independent counsel by the President and his agents by establishing that an independent counsel has "independent authority" to carry out his duties, 28 U.S.C. § 594(a), and that the President's agents are to have no role in performing the tasks delegated to an independent counsel save at the independent counsel's request. 28 U.S.C. § 597(a). By depriving the President of his essential authority to direct one who exercises core executive powers, the statute strips the President of those powers, and thus "prevents the Executive

[1] *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), is not to the contrary. *Kendall* holds only that Congress may impose ministerial duties on executive officers, and that the President may not order such officers to defy the law. The case does not contest that in performing their discretionary duties under the law such officers are subject to the President's supervision. *See* Miller, *Independent Agencies*, 1986 Sup. Ct. Rev. 41, 59 n.65.

Branch from accomplishing its constitutionally assigned functions." *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977).

The denial of Presidential authority not only deprives the Executive Branch of its essential prosecutorial discretion, but also interferes with other areas of Presidential authority, such as foreign affairs. The consequences of the absence of Executive Branch supervision in this area were illustrated on several occasions in the *Deaver* case. For example, *Amicus Curiae* Seymour, provoked an international incident last spring by sending FBI agents to the Canadian Embassy, against the wishes of the State Department and in violation of accepted principles of diplomatic immunity, to attempt to serve subpoenas on the Ambassador of Canada and his wife. Mr. Seymour's efforts were formally opposed by the State Department and the Department of Justice, and eventually were rebuffed by the District Court, *see United States v. Deaver*, Cr. No. 87-096 (D.D.C. June 22, 1987), but not before Mr. Seymour had publicly accused the Canadian Government of "duplicity" and "obstructing justice," *id.*, May 27, 1987 Declaration of Whitney North Seymour, Jr., at 5, 8, and not before he had charged Abraham D. Sofaer, Legal Adviser of the State Department, with making "inaccurate" and "misleading" statements and with not being "impartial." *Id.*, June 10, 1987 Declaration of Whitney North Seymour, Jr., at 1, 2, 7.

Mr. Seymour then sparked yet another diplomatic crisis with Canada immediately before trial. Frustrated in his attempt to serve the Canadian ambassador with a trial subpoena, he sent a letter to the Canadian Government threatening to introduce at trial evidence unrelated to the subject matter of the Ambassador's testimony, but that supposedly related to unlawful actions taken by Mr. Deaver on Canada's behalf, if Canada did not waive its diplomatic immunity and produce its Ambassador as a prosecution witness. *See id.*, Supplemental Statement of Interest of the United States (Oct. 15, 1987). Not surprisingly, this tactic, too, provoked a diplomatic protest by the Canadian Government and again required intervention by the

State Department and the Department of Justice.[2] Finally, Mr. Seymour held a press conference on the Courthouse steps following the trial and blamed the Canadian Government for Mr. Deaver's acquittal on the perjury charges relating to acid rain.[3] *See id.*, Defendant's Supplemental Memorandum In Support of His Previously Filed Motion to Dismiss On Constitutional Grounds (January 5, 1988). Mr. Seymour's intemperate public attacks on the Canadian Government highlight the problems of granting prosecutorial powers to an unaccountable individual outside the Executive Branch.

Appellant argues that the Act's prohibition against the President having any supervisory role with respect to an independent counsel is allayed by the statute's grant to the Attorney General of unreviewable authority to determine whether the independent counsel process shall be initiated. *See* App. Br. at 18-19. But in view of its severe circumscription, this so-called "authority" is no authority at all. The Act plainly is designed to *curtail* the Attorney General's authority and discretion not only by commanding him to conduct a preliminary investigation under specified circumstances, but also by requiring him to request appointment of an independent counsel 1) unless that investigation reveals *no* reasonable grounds for further investigation, or 2) if the investigation is not completed within ninety days. 28 U.S.C. §§ *591, 592; see also Dellums v. Smith*, 797

[2]Mr. Seymour challenged this intervention in part on the ground that the Executive Branch had no jurisdiction to interfere with his investigation and prosecution of Mr. Deaver. *See United States v. Deaver*, Independent Counsel's Response To "Supplemental Statement Of Interest Of The United States" (October 16, 1987).

[3]This was a hollow excuse for the acquittal inasmuch as Mr. Seymour had earlier withdrawn from the jury's consideration the few portions of this Count which related to the Ambassador. Mr. Seymour also used the occasion of his post-trial courthouse-steps press conference to publicly attack the integrity of the Reagan Administration generally, and to denounce Secretary of State Schultz for having expressed, during his testimony at trial, a favorable opinion of Mr. Deaver. *See United States v. Deaver*, Defendant's Supplemental Memorandum In Support of His Previously-Filed Motion to Dismiss on Constitutional Grounds (January 5, 1988).

F.2d 817, 823 (9th Cir. 1986). Assuming the Attorney General obeys the law, these directives provide insufficient scope for the Executive Branch's exercise of prosecutorial discretion, which encompasses far more than the power merely to determine whether "further investigation" is warranted:

> [I]n the first instance an Attorney General in myriad situations must exercise the discretion conferred upon him by law. He must evaluate the evidence necessary to an informed judgment. He must decide whether to prosecute or not. He must decide whom to prosecute. He must decide when to prosecute. Functions in this area belong to the Executive under the Constitution, Article II, Sections 1 and 3 . . . .

Weisberg v. United States Department of Justice, 489 F.2d 1195, 1201 (D.C. Cir. 1973) (*en banc*). In leaving only a fraction of prosecutorial discretion with the Attorney General, effectively dictating how that fraction is to be exercised, and irrevocably committing the remainder to an officer outside the President's control, the statute violates the cardinal principle of unified executive control over the enforcement of the laws.

Significantly, *amicus curiae* Seymour argues that the Act leaves virtually all of the Executive Branch's prosecutorial discretion with the Attorney General. Mr. Seymour bases this argument on his view that the Attorney General's preliminary finding that there exist reasonable grounds to believe that further investigation *or* prosecution is warranted, *see* 28 U.S.C. § 592(c)(1), amounts to an exercise of prosecutorial discretion by the Executive Branch with respect to the ultimate decision to prosecute. Therefore, according to Mr. Seymour, an independent counsel's decisions to obtain an indictment and prosecute are but "ministerial" acts. Seymour Br. at 14-17. This argument, however, not only ignores the range and breadth of issues and concerns that inform a constitutionally-empowered prosecutor's ultimate decision whether to prosecute at the conclusion of a full investigation, *see Department of Justice Manual*, Vol. 8, 9-27.200-27.270 (June 1987), but it also fails to

explain how the Attorney General could have made a decision to prosecute Mr. Deaver for false statements before a grand jury that had not even been convened as of the date of the Attorney General's preliminary investigation. Indeed, to equate the Attorney General's preliminary finding with an ultimate decision to prosecute, as does Mr. Seymour, is considerably more alarming even than the much-debated statement by Independent Counsel Lawrence E. Walsh that he felt obligated to prosecute in the Iran-Contra investigation if his investigation revealed probable cause to believe that a crime had been committed.

Under Mr. Seymour's theory, the target of an independent counsel investigation *must* be prosecuted once the Attorney General finds that there are reasonable grounds to believe that further investigation or prosecution is warranted, so long as there are any facts concerning any matter that will support any theory of prosecution. While this interpretation of the Act may explain Mr. Seymour's decision to obtain an indictment charging Mr. Deaver with perjury after being appointed to investigate allegations of violations of 18 U.S.C. § 207, it does obvious violence both to the Department of Justice guidelines governing the exercise of prosecutorial discretion, as well as to the due process rights of the subjects and targets of these investigations.[4] It also points up once more the very real dangers

[4]For example, Mr. Seymour charged Mr. Deaver with five counts of perjury, three of which contained multiple allegations of false testimony. One count, in fact, contained no less than 20 separate allegedly false statements. *See United States v. Deaver*, Indictment (March 18, 1987). Even more disconcerting, perhaps, another count charged Mr. Deaver with perjury based upon a perjury trap set by Mr. Seymour himself. After advising Mr. Deaver that the next question he would be asked was merely for background purposes, Mr. Seymour asked Mr. Deaver whether he had ever contacted anyone in the government on behalf of TWA, a client Mr. Deaver had not been advised would be a subject of inquiry before the grand jury. Mr. Deaver said he did not recall whether he had or not, and Mr. Seymour moved on. Mr. Seymour did not mention that weeks earlier he had received a tip from a reliable source that Mr. Deaver had contacted then-Secretary of Transportation Elizabeth Dole on behalf of TWA. Nor did he attempt to refresh Mr. Deaver's recollection before the grand jury concerning this alleged contact; he merely turned to other

of entrusting the nation's prosecutorial power to an individual who is not a part of Executive Branch. Armed with such a notion of his mandate, an independent counsel could, as Mr. Seymour plainly did, embark on a mission to return an indictment against the target of his investigation no matter how long it took, no matter what the cost to the government or to the target, no matter how inconsistent it might be with Justice Department guidelines, and no matter how far afield it was from the initial allegations assigned to him for investigation and possible prosecution.

The potential for this kind of abuse arising from the unaccountable exercise of power was of grave concern to the Founding Fathers.[5] As James Madison observed in his Federalist Paper No. 51:

matters. *See id.*, Motion of Defendant Michael K. Deaver To Dismiss Count Three On Grounds Revealed By Newly Discovered Evidence (May 8, 1987).

[5]In laying the framework for a new government, the delegates to the constitutional convention were conscious of the principle that the vesting of executive power in an unaccountable individual was an invitation to tyranny. Accordingly, they crafted an executive branch in which the president was to be elected to serve for a limited four year term, and they provided procedures for impeachment and removal from office. *See Bowsher v. Synar*, 106 S. Ct. at 3186. The drafters, however, specifically rejected proposals to check executive power by dividing that power among several magistrates or by creating a council of revision. *See* 1 M. Farrand, Records of the Federal Convention (1966) at 93-114 (debate of June 4, 1787); *see also The Federalist* No. 38, at 236-37 (J. Madison) (C. Rossiter ed. 1961); *id.* No. 48, at 312 (J. Madison); *id.* No. 69, at 417 (A. Hamilton); *id.* No. 70 at 424-31 (A. Hamilton); *id.* No. 77, at 461-63 (A. Hamilton). These proposals were rejected not only because a single magistrate would be more efficient, but also because "Unity in the Executive ... would be the best safeguard against tyranny." 1 M. Farrand at 66, 74 (remarks of Mr. Wilson); *see also The Federalist* No. 70, at 427-30 (A. Hamilton). The creation of an independent counsel possessing significant executive powers therefore violates two core principles underlying Article II of the Constitution: *first*, that the possessor of executive power should be accountable to the people, and *second*, that competing sources of executive authority lead to tyranny. Unlike any other person exercising core executive power in our government, the independent counsel is accountable only to himself.

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

The Federalist No. 51, at 322 (J. Madison). Significantly, Mr. Seymour makes much in his brief of the service that he, as an independent counsel, purportedly has done in the public interest in prosecuting Mr. Deaver, and of the confidence expressed by the public in the results his office achieved. *See, e.g.*, Seymour Br. at 9, 11, 13. But such attempts to bootstrap assertions regarding the necessity and integrity of the office of independent counsel by way of talismanic invocations of an unanchored notion of the public interest are unavailing. In our democratic government of checks and balances, where numerous competing interests constantly vie for supremacy, the public interest can only truly be ascertained and served through the workings of the constitutional processes of that government. As one commentator has observed:

> The Framers created three departments of government, according to Madison, in order to avoid the accumulation of all powers in the same hands, a condition that "may justly be pronounced the very definition of tyranny." Mere "parchment barriers" between the branches would not prevent tyranny, because power is of an "encroaching nature." To prevent the gradual concentration of power in a single department, therefore, it was necessary to give to "those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." Ambition would counteract ambition, and the government would gain needed stability through a dynamic tension of opposing forces.

Miller, *Government Lawyers' Ethics In A System Of Checks And Balances*, 54 U. Chic. L. Rev. 1293, 1296 (1987) (footnotes omitted). There is no surer anchor for the floating concept of the public interest than the accountable exercise of power pursuant to the doctrine of the separation of powers. Cut loose from the constitutional moorings of checks and balances, an independent counsel can only disserve the public interest.

We reinforce this argument in the succeeding sections by demonstrating that, to the extent independent counsel are accountable at all, they are beholden only to Congress and the Courts, and thus exercise core executive power in violation of well-settled principles of separation of powers. And to the extent, as appellant and others contend, independent counsel are answerable to neither of these coordinate branches, they exercise plenary power unhitched from the structural separation-of-powers principles devised by the Framers to ensure against tyranny and the arbitrary exercise of power.

II. THE ACT IMPERMISSIBLY INJECTS THE JUDICIAL BRANCH INTO THE EXERCISE OF CORE EXECUTIVE POWER.

The judiciary's supreme authority "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), is narrowly circumscribed by the command that it be exercised only in the context of justiciable cases or controversies. As this Court explained in *United Public Workers of America v. Mitchell*, 330 U.S. 75, 90 (1947):

> The Constitution allots the nation's judicial power to the federal courts. Unless these courts respect the limits of that unique authority, they intrude upon powers vested in the legislative or executive branches. Judicial adherence to the doctrine of the separation of powers preserves the

> courts for the decision of issues, between litigants, capable of effective determination.

The case-or-controversy requirement of Article III necessarily excludes any general judicial authority to supervise the execution of the laws. *See, e.g., Vermont v. New York*, 417 U.S. 270, 277 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J. concurring).

The Act transgresses this limitation by assigning to a Special Division of the Court of Appeals — in the complete absence of a case or controversy — the power to assign an independent counsel his duties through the nonjudicial acts of defining or redefining his jurisdiction, or of assigning him new matters to investigate, 28 U.S.C. §§ 593(b) and (c); to demand from an independent counsel an accounting of his conduct in office, 28 U.S.C. §595(b); and to determine for itself whether he has completed his assigned duties. 28 U.S.C. § 596(b)(2). The essentially supervisory and executive nature of this authority, as well as its centrality to the legislative scheme, were underscored in the Senate Committee Report on the bill that became the Ethics in Government Act:

> [A] very important part of the responsibility of the division of the court is to define the prosecutorial jurisdiction of the special prosecutor. The prosecutorial jurisdiction of the special prosecutor is one of the most important devices for the *control* of the special prosecutor and the *accountability* of such a special prosecutor.

S. Rep. No. 95-170, 95th Cong., 1st Sess. 56 (1977), *reprinted* in [1978] U.S. Code Cong. & Admin. News 4216, 4272 (emphasis supplied). Vesting such power to *control* executive action in a court clearly violates the principles of separation of powers enshrined in both Article II and Article III of the Constitution.

In addition, the Special Division has conceived its authority to extend to the issuance of directives purporting, *inter alia*, to (1) resolve jurisdictional arguments between independent counsel and the Justice Department, *see In re Olson*, 818 F.2d 34 (D.C. Cir. Indep. Couns.

Div. 1987); (2) decide constitutional issues not raised by any parties and over which the Special Division has no jurisdiction, *see id.*; and (3) determine the employment classification of independent counsel and their associates, and exempt them from the operation of federal conflict-of-interest laws, *see In re Michael K. Deaver, Designation of Special Government Employees*, Division No. 86-2 (July 2, 1986); *In re Theodore B. Olson*, Division No. 86-1 (June 18, 1986). The latter orders even go so far as to establish "the Office of Independent Counsel as a separate special agency" — a stunning usurpation of non-judicial authority.[6] The issuance of these orders, as well as the reliance of various independent counsel upon the orders in their disputes with the Justice Department,[7] demonstrates the reality of the extrajudicial power conferred upon the Special Division by the Act.[8]

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[6] *Cf. Sealand Service, Inc. v. ICC*, 697 F.2d 1166, 1168 (D.C. Cir. 1983) ("It is the responsibility of Congress and the Executive Branch, not the courts, to apportion authority between a cabinet officer and an independent agency such as the ICC."). Although the Act as recently amended contains its own legislatively-devised exemptions for independent counsel from federal conflict-of-interest statutes, there is no reason to be sanguine that the Special Division will not reach out and decide other equally nonjudicial issues in the future in its effort to administer the Act and supervise the exercise of executive power.

[7] *See Alexia Morrison: Taking the Heat*, Legal Times, June 1, 1987, at 8, col. 2-3 ("Morrison also points out that she and Seymour were granted exemptions to the conflict laws from the special federal court panel that oversees the independent counsel probes").

[8] The processes through which the Special Division exerts its authority are also revealing of the relationship between independent counsel and the court. According to a statement submitted to a subcommittee of the House Judiciary Committee by Presiding Judge MacKinnon, the orders purporting to exempt independent counsel from conflict of interest laws were issued after Independent Counsels Seymour and Morrison together visited Judge MacKinnon in his chambers and asked that the order be entered. Judge MacKinnon concluded that the orders comported with his understanding of the statute and issued one of them that same day. (Whether he consulted the other members of the "court" is unclear.) *See* U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Administrative Law and Governmental Relations, Supplemental Statement of George E. MacKinnon, at 5-7.

Once again, the *Deaver* case provides a telling illustration of the Special Division's assumption of supervisory authority under the Act. When Mr. Seymour was appointed to investigate Mr. Deaver, his jurisdiction was defined to encompass three specific allegations of possible violations of 18 U.S.C. § 207 by Mr. Deaver in connection with his representation of two clients, as well as matters "related" to those allegations. *See In re Michael K. Deaver, Order Appointing Independent Counsel*, Division No. 86-2 (May 29, 1986). Significantly, although other allegations of possible section 207 violations were submitted to the Justice Department for investigation, they were not included in Mr. Seymour's jurisdiction at the conclusion of the Attorney General's preliminary investigation. Nevertheless, Mr. Seymour proceeded to subpoena every document ever generated by Mr. Deaver's firm, as well as tens of thousands of other documents from throughout the government and from Mr. Deaver's clients as part of an investigation of *all* of Mr. Deaver's business activities on behalf of virtually *all* of his clients — including separate inquiries into the legality of *all* of the business activities of *all* of Mr. Deaver's associates on behalf of these clients.[9]

Seven months into his investigation, however, Mr. Seymour turned his attention to other possible prosecution theories, including whether false statements had been made before the Deaver grand jury; whether false statements had been made at a congressional subcommittee hearing that predated Mr. Seymour's appointment; and whether Mr. Deaver had conspired with any of his associates to violate any laws. Challenged by Mr. Deaver as to his jurisdiction to investigate these new matters, Mr. Seymour turned for guidance not to the Justice Department, as appellant Morrison properly did in the Olson investigation, but to the Special Division, submitting a secret petition for "clarification" of his jurisdiction. The Special Division obliged with an order granting Mr. Seymour jurisdiction to proceed against Mr. Deaver on perjury and false statement

[9]In addition to subpoenaing documents, Mr. Seymour ordered approximately 300 FBI field interviews and called between 110 and 150 individuals before the grand jury.

charges, as well as to investigate any associate or employee of Mr. Deaver and any other person who may have conspired with Mr. Deaver to violate any law. *See In re Michael K. Deaver, Supplemental Order*, Division No. 86-2 (Dec. 16, 1986).[10]

Ironically, the Special Division's Order had the unintended effect of eviscerating the argument, advanced here by appellant and others, that under the Division's prior decision in *In re Olson*, the Attorney General retains an ongoing, supervisory check on an independent counsel's jurisdiction. For under the Division's ruling in the *Deaver* case, *In re Olson* is now a nullity for all practical purposes: all an independent counsel must do to expand his or her jurisdiction is bypass the Attorney General's office altogether, and proceed by way of secret *ex parte* application to the Special Division. The Division's Order in the *Deaver* case also reveals the nature of the authority wielded by the court under the Act. Supervising executive officers in the performance of their duties by responding to their *ex parte* requests for guidance or expanded authority is in no sense the exercise of a judicial function; it is, pure and simple, an assumption of executive power.

Finally, the exercise of executive power by the courts also raises serious due process concerns resulting from its tendency to erode — whether as matter of fact or only as a matter of public perception — the objectivity and independence of the judiciary. *See, e.g., Commodity Futures Trading Commission v. Schor*, 106 S.Ct. 3245, 3256 (1986); *United States v. Will*, 449 U.S. 200, 218 (1980); *In re Application of President's Commission on Organized Crime*, 763 F.2d 1191, 1197 (11th Cir. 1985). In the *Deaver* case, this problem was particularly acute. The indictment Mr. Seymour obtained expressly stated that Mr. Seymour had been appointed independent counsel in the case by the Special Division of the Court of Appeals

[10]As a result, Mr. Seymour eventually advised seven other individuals in addition to Mr. Deaver that they were either subjects or targets of his investigation and therefore risked prosecution by his office, despite the absence of any authority from the Justice Department or the Attorney General's office to enforce such threats.

for the District of Columbia Circuit. *See United States v. Deaver*, Indictment (March 18, 1987). The district court before which the *Deaver* case was tried, moreover is in the same jurisdiction as the Special Division which appointed Mr. Seymour, and which later issued a decision upholding the constitutionality of the Act. *See In re Olson*. Thus, even though the Special Division had no jurisdiction to decide the constitutional issue, the district court felt bound to follow that decision, and expressly relied upon it in its memorandum order denying Mr. Deaver's post-indictment challenge to the constitutionality of the Act. *See United States v. Deaver*, Mem. Order (May 13, 1987). In addition, the district court understandably was reluctant to overrule the Special Division's selection of Mr. Seymour as independent counsel. Accordingly, it not only denied without explanation Mr. Deaver's motion under *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124 (1987), to ensure that neither Mr. Seymour nor any of his associate independent counsel had a conflict of interest in the case, *see United States v. Deaver*, Order (October 5, 1987), but it also denied without a hearing Mr. Deaver's subsequent motion to disqualify Mr. Seymour on the grounds of his personal and political conflict of interest in the case. See text *infra* at p. 23. The special relationship between an independent counsel and the Special Division of the court, together with the district court's natural deference to the court of appeals, call into question the appearance of fairness, objectivity and impartiality otherwise attending court rulings. Indeed, in view of the apparent conflict between the district court's obligation to ensure Mr. Deaver a fair trial, and its conceded deference to the Special Division that hand-picked the prosecutor and then guided and endorsed his investigation, none of the rulings entered by the district court can be considered free of the taint of at least an appearance of partiality. Due process and Article III of the Constitution, however, require more than that in a criminal case in which a man's liberty is at stake.

III. THE ACT IMPERMISSIBLY GRANTS SUPERVISORY AUTHORITY OVER EXECUTIVE FUNCTIONS TO THE LEGISLATIVE BRANCH.

The Constitution for the most part limits Congress to a legislative role. With a few specific exceptions, the only authority granted to Congress by the Constitution is the authority to legislate upon specific subjects. *See generally INS v. Chadha*, 462 U.S. 919 (1983). In the execution of the laws enacted through this process, Congress has no part: "The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts." *Bowsher v. Synar*, 106 S. Ct. at 3187. "The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." *Id.* at 3188.

The Act's provisions granting the House and Senate Judiciary Committees a role in the initiation of the independent counsel process, as well as requiring independent counsel to report to Congress and to cooperate with congressional oversight, impermissibly assign an executive role to Congress. While it is true that Congress may exercise oversight and investigative functions where these are related to its legislative role, *see, e.g., McGrain v. Dougherty*, 273 U.S. 135 (1927), Congress is not entitled to exceed its legislative limits. *See Buckley v. Valeo*, 424 U.S. 1, 138 (1976); *Watkins v. United States*, 354 U.S. 178 (1957). Here, the provisions that make an independent counsel answerable to Congress clearly expand Congress's role beyond that incidental to its legislative function. For as the committee reports indicate, the purpose of the provisions requiring independent counsel to report to Congress and to "cooperate" with congressional oversight was not to aid Congress in its legislative tasks, but to ensure the "accountability" of independent counsel and to prevent "the possibility of a runaway [special] prosecutor." S. Rep. No. 95-170, 95th Cong., 1st Sess. 70 (1977), *reprinted* in [1978] U.S. Code Cong. & Admin. News 4216, 4286; H.R. Conf. Rep. No. 95-1756, 95th Cong., 2d Sess. 78 (1978),

reprinted in [1978] U.S. Code Cong. & Admin. News 4381, 4394.[11] Such a supervisory role for Congress in the execution of the laws is expressly forbidden by *Bowsher v. Synar*, 106 S. Ct. at 3187-3189, and *INS v. Chadha*, 462 U.S. at 954-955.

In the *Deaver* case, Congress in fact actively directed the course of Mr. Seymour's investigation and prosecution. Two of the charges on which Mr. Deaver stood trial stemmed directly from the "referral" of perjury charges to Mr. Seymour by Representative John D. Dingell and his Oversight and Investigations Subcommittee of the House Committee on Energy and Commerce. Despite the absence of any authorization in the Act for such congressional referral of charges — or for bypassing the Attorney General; and despite the fact that these charges related to events occuring *prior* to Mr. Seymour's appointment — and thus in no way could be deemed to have grown out of Mr. Seymour's investigation of alleged substantive Ethics Act violations — Mr. Seymour unhesitatingly assumed responsibility for investigating the allegations, and eventually based two of the five perjury counts in the indictment on Mr. Deaver's testimony before the Dingell Subcommittee. This incident reveals only too well the reality of congressional aggrandizement under the Act.

IV. THE APPOINTMENT OF INDEPENDENT COUNSEL BY A COURT VIOLATES THE APPOINTMENTS CLAUSE.

The appointment of independent counsel by the Special Division is permissible under the Appointments Clause only if an independent counsel is both an "inferior officer," and one whose appoint-

[11]At the very least, as the Department of Justice has observed, the provisions "imply that Congress could exercise control over prosecutorial decisions." 123 Cong. Rec. 21002 (1977) (Written Statement of John Harmon, Acting Assistant Attorney General, Office of Legal Counsel). The Department of Justice recommended that this "implication" be avoided by deleting the oversight provision. *See id.* Instead, Congress confirmed the implication by retaining the language in the face of the objection.

ment by a court is not "incongruous." In determining whether these requirements have been satisfied, the Appointments Clause is not to be read in isolation, but must be viewed "in the context of th[e] cognate [constitutional] provisions" reflecting the "concern of the Framers of the Constitution with maintenance of the separation of powers." *Buckley v. Valeo*, 424 U.S. at 124. The Appointments Clause reflects the Framers' view that "each department . . . should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others." *The Federalist* No. 51, at 321 (J. Madison).

A. *An Independent Counsel Is Not An Inferior Officer*

An independent counsel under the Act is not an inferior officer for the simple reason that he has no superior. The one consistent definition in the cases is that the term "inferior officer" means an officer *subordinate* to those superior officers requiring appointment by the President. *See, e.g., Buckley v. Valeo*, 424 U.S. at 124; *United States v. Eaton*, 169 U.S. 331, 342-344 (1898); *United States v. Germaine*, 99 U.S. 508, 509-510 (1879); *Collins Case*, 14 Ct. Cl. 569, 574 (1878). This definition accords perfectly with the plain meaning of the word "inferior": "[o]ne who, in relation to another, has less power and is below him; one who is bound to obey another." Black's Law Dictionary, 918 (4th ed. 1968). It also makes coherent constitutional sense, for it assures that the ultimate lines of core executive power run through a superior officer appointed by the President with the advice and consent of the Senate. Because an independent counsel is not the subordinate of any other officer of the United States, he is not an inferior officer within the meaning of the Clause.

This conclusion also follows from the recent decision in *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied sub nom. North v. Walsh*, 108 S. Ct. 753 (1988), an Appointments Clause challenge to the authority of Independent Counsel Walsh. The court of appeals concluded that it need not decide the constitutionality of Mr. Walsh's appointment under the Act if his "back-up" appointment under the Attorney General's regulation was valid. An Appointments

Clause issue nevertheless was presented, because the latter appointment had not been made by the President with the advice and consent of the Senate. The validity of that appointment thus turned on whether Mr. Walsh, in his capacity as a Justice Department appointee, was an inferior officer. The court of appeals held that he was, because he was directly subordinate to the Attorney General, who could revoke the regulation at will. Unlike an independent counsel appointed under the Justice Department regulations, however, an independent counsel appointed under the Act has a *statutory* guarantee of independence that makes him more than a mere "*subordinate* . . . charged with the performance of the duty of the superior for a limited time and under special and temporary conditions." *United States v. Eaton*, 169 U.S. at 343 (emphasis added). An independent counsel under the Act is thus, in *Eaton's* terms, a "superior official."[12]

B. *Appointment of Independent Counsel By A Court Is Constitutionally Incongruous*

Even if an independent counsel could be classified as an inferior officer, it does not follow that his appointment properly can be vested in a court. The Appointments Clause's proviso that the appointment of inferior officers may be vested "in the Courts of Law" should not be construed to contradict the Framers' admonition that the separation of powers would be compromised if the other branches could appoint executive officers. *See The Federalist* No. 51, at 321 (J. Madison) (C. Rossiter ed. 1961); *Id.* No. 72, at 436 (A. Hamilton). Rather, interpretation of the Clause should recognize

[12]This same distinction renders inapplicable the reasoning of *United States v. Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963), in which the court upheld the constitutionality of judicial appointment of interim United States attorneys. Unlike an independent counsel, an interim United States attorney is truly subordinate to the Attorney General in that he is subject to the Attorney General's supervision in the performance of all his duties, *see* 28 U.S.C. § 519, removable at the will of the Executive, *see Parsons v. United States*, 167 U.S. 324 (1897), and may be replaced by a permanent Presidential appointee "at any time, the judicial appointment notwithstanding." *Solomon*, 216 F. Supp. at 842-843.

that the power to appoint inferior officers "was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged." *Ex parte Hennen*, 38 U.S. (13 Pet.) 225, 258 (1839).

To be sure, *Ex Parte Siebold*, 100 U.S. 371 (1880), held that the appointive powers of the courts were not strictly limited to officers who could be classed as "judicial." But the attempt to vest the courts with appointive power over an officer empowered to exercise the full investigative and prosecutorial authority of the United States far exceeds the limits on that power that were recognized in *Siebold*. From the standpoint of separation of powers, judicial appointment of such an officer is "incongruous" not only because of the centrality of the investigative and prosecutorial functions to the President's mission to take care that the laws are faithfully executed, but also because of the lack of any judicial power with respect to those functions. *See* Currie, *The Distribution of Powers after Bowsher*, 1986 Sup. Ct. Rev. 19, 36.

The incongruity of judicial entanglement in the appointment of prosecutors is underscored by this Court's recent opinion in *Young v. United States ex rel. Vuitton et Fils S.A.*, *supra*. In *Young*, the Court held that the only reason the judicial appointment of private attorneys to prosecute criminal contempts does not violate the principle of separation of powers is that the judiciary has the inherent power to punish contempts in order "to vindicate its own authority without complete dependence on other branches." *Id.* at 2131. The Court expressly noted that the exercise of this inherent authority to punish contempts is not analogous to the "execution of the criminal law in which only the executive branch may engage." *Id.* at 2133. "Acknowledging the limited authority of courts to appoint contempt prosecutors thus provides no principle that can be wielded to eradicate fundamental separation-of-powers boundaries." *Id.* at 2134 n.10. As Justice Scalia observed, the Court's opinion creates "a special exception for prosecutions of criminal contempt" and does not contest the "well settled general princip[e]" that "since the prosecution of law violators is part of the implementation of the laws, it is — at least to the extent that it is publicly exercised —

executive power, vested by the Constitution in the President." *Id.* at 2142 (Scalia, J., concurring in the judgment). In recognizing the exceptional nature of a court's power to appoint contempt prosecutors, the majority in *Young* implicitly asserted the inappropriateness — or incongruity — of a judicial role in the appointment of prosecutors generally.[13]

Appellant urges this Court to adopt an incongruity test that is premised not on a searching inquiry into whether the appointment power granted to the court by the Act is consistent with or properly ancillary to the judicial function, but rather on an *ad hoc* inquiry into whether judges might be better suited in certain circumstances to perform a particular executive function than is the President. Such a view of the incongruity limitation, grounded completely in subjective views of expediency, is plainly at odds with the separation-of-powers principles that the Appointments Clause was intended to enshrine. If the incongruity test is to serve its function, it cannot be subject to the vicissitudes of free-ranging policy judgments as to the desirability of particular grants of appointment power; rather, it must require an inquiry into the consistency of judicial appointment with structural separation-of-powers concerns. Under this proper inquiry, the incongruity test cannot be satisfied by the assertion that judicial control over core executive functions is somehow

[3]The incongruity of the court's power to appoint independent counsel stems not only from the nature of an independent counsel's duties, but also from the nature of the functions the court must assume in conjunction with its appointment power. As the three-judge district court held in *Hobson v. Hansen*, 265 F. Supp. 902 (D.D.C. 1977), the incongruity limitation is transgressed when a grant of appointive power to a court is coupled with actual supervisory or administrative authority over the persons appointed. *Id.* at 913 & n.14. That, of course, is precisely the case here: the Act requires not only that the Special Division appoint independent counsel, but also that the court perform significant supervisory functions, including defining the independent counsel's tasks and determining whether and when he or she has completed them. *See* 28 U.S.C. §§ 593(b) and 596(b)(2). These supervisory powers plainly run afoul of the incongruity limitation even if judicial appointment of independent counsel could, standing alone, be deemed proper.

preferable to Presidential control, for such a justification is simply impermissible under the Constitution.

C. *Courts Are Functionally Ill-Suited To Appoint Independent Counsel*

Quite apart from the inappropriateness of appellant's suggested analysis under our constitutional scheme, there is serious question as to whether entrusting the appointment of independent counsel to the court itself is a trustworthy scheme. The Act, for example, contains no guidelines or criteria for the Special Division to follow in selecting an "appropriate" independent counsel. Nowhere does the Act require the court to ascertain whether the appointee himself may have a personal or political conflict of interest that could influence the objectivity or integrity of the investigation he conducts or the prosecution he alone has the authority to bring against the target of his prosecutorial power.

The *Deaver* case illustrates the danger inherent in the statute's appointive mechanisms, for there is no evidence that the Special Division even knew, much less considered, before making its appointment in that case that Mr. Seymour had long been embroiled in a legal battle — before both the courts and the Federal Election Commission — in which he alleged that improprieties by a political PAC Mr. Deaver helped found, and with which he was closely associated, were in part to blame for Mr. Seymour's defeat in a 1982 Senate race. *See Deaver v. Seymour*, C.A. No. 87-0447, Plaintiff's Statement of Material Facts Not Genuinely in Dispute (March 5, 1987) (D.D.C.); *United States v. Deaver*, Defendant's Memorandum in Support of Motion To Dismiss One Count of the Indictment On Grounds of Prosecutorial Vindictiveness (April 20, 1987). Had Mr. Seymour's appointment been subject to confirmation by the Senate, as would that of any other person exercising the full power of the Attorney General of the United States, his involvement in that dispute even as of the date of his appointment, as well as the consequent likelihood of his lack of impartiality toward Mr. Deaver, almost certainly would have surfaced and been fully aired prior to

any appointment decision. Instead, the investigation of Mr. Seymour's personal and political background, and of any possible conflicts of interest, was left to Mr. Deaver alone, whose post-appointment uncovering of Mr. Seymour's partiality fell on deaf ears, and whose motion to disqualify Mr. Seymour before trial was denied without a hearing.

V. THE ACT'S REMOVAL PROVISIONS IMPERMISSIBLY INTERFERE WITH EXECUTIVE PREROGATIVES.

A. *The Statute Unconstitutionally Restricts the President's Removal Power*

The importance of Presidential authority to remove executive officers was explained by James Madison during the debate in the First Congress over the issue of removal of the Secretary of State:

> If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest will depend, as they ought, on the President, and the President on the community.

1 *Annals of Cong.* 499. Madison's views prevailed in the First Congress, and, in the resulting "Decision of 1789," the Congress recognized the inherent executive power of removal. *See generally Bowsher v. Synar*, 106 S. Ct. at 3187.

The constitutional necessity of Presidential removal power over executive officers — and in particular of prosecutors — was underscored some forty years later by then-Attorney General Taney, in *The Jewels of the Princess of Orange, supra*. In that opinion, Taney explored the possibility that a district attorney might disobey the President, and considered the President's recourse in that event:

> mained in office, would still go on; because the President could give no order to the court or clerk to make any particular entry. He could only act through his subordinate officer, the district attorney, who is responsible to him, and who holds his office at his pleasure. And if that officer still continued a prosecution which the President was satisfied ought to be discontinued, the removal of the disobedient officer, and the substitution of one more worthy in his place, would enable the President, through him, faithfully to execute the law. And it is for this, among other reasons, that the power of removing the district attorney resides in the President.

2 Op. Atty Gen. at 489. In short, as this Court subsequently agreed, an unfettered removal power is the essential trump card that enables the President to maintain his sway over those executing the laws.[14] *See Myers v. United States*, 272 U.S. at 122.[15]

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[14]Contrary to the suggestion of the Special Division in *In re Olson*, 818 F.2d at 44-45, the essential power is not that of removal for "impropriety," but of removal for *disobedience*.

[15]While *Myers* suggested that the President's removal power over inferior officers might be qualified in cases in which Congress chose to authorize their appointment by the heads of departments, this feature of *Myers* is irrelevant to this case for three reasons. First, as shown above, an independent counsel is not an inferior officer. Second, *Myers* nowhere mentioned the possibility that Presidential removal power could be limited as to an executive officer appointed by a *court*. *See* L. Tribe, *American Constitutional Law* § 4-9, at 189-90 n.23 (1978). Because the discharge of executive functions by one so appointed is itself in derogation of Presidential authority, Presidential removal power is all the more essential to ensure some accountability to the Executive Branch. Third, and most important, the reasons for requiring unrestricted Presidential removal power over the independent counsel apply equally regardless of whether the independent counsel is an inferior or superior officer. In both cases the power is necessary to vindicate the President's authority to take care that laws be faithfully executed. *See* Currie, *The Distribution of Powers after Bowsher*, 1986 Sup. Ct. Rev. at 34-35; Miller, *Independent Agencies*, 1986 Sup. Ct. Rev. at 44.

This conclusion is not, as appellant contends, undermined by this Court's decision in *United States v. Nixon*, 418 U.S. 683 (1974). Rather, that case explicity reaffirmed that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case," *id.* at 693, and held only that where the President or his alter ego, the Attorney General, has chosen to promulgate a regulation creating an independent special prosecutor's office and insulating the special prosecutor from removal, a court must give effect to the Executive Branch's own regulation so long as it is in force. *Id.*at 696. The Court's recognition of the Executive Branch's own power of self-denial — which the executive was free to disavow at any time by revoking the regulation providing for the special prosecutor's authority, *see id.; cf. In re Sealed Case*, 829 F.2d at 56 n.33 — by no means suggests that similar restraints may be foisted on the President through legislation that the Executive Branch is not free to abrogate unilaterally.

B. *The Statute Vests the Judicial Branch with Unprecedented Powers of Removal Over an Executive Officer*

The removal provisions of the Act are further flawed by the authority they give to the appointing court to terminate an office of independent counsel, and thus in effect remove the independent counsel, whenever it determines that further proceedings by the independent counsel are no longer "appropriate." 28 U.S.C. § 596 (b)(2). As the three-judge court observed in its opinion in *Synar v. United States*, 626 F. Supp. 1374, 1401 (D.D.C. 1986) (three-judge court), "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." Accordingly, legislation placing removal power over executive officials outside the Executive Branch "creates the here-and-now subservience to another branch that raises separation-of-powers problems." Id. at 1392 (footnote omitted). This Court's affirmance in *Bowsher v. Synar* rested precisely on the ground that the "separation-of-powers problems" created by such subservience are insuperable: the usurpation of executive power inherent in any legislation purporting to grant to another branch such potentially coercive power over officers performing executive functions renders the legislation unconstitutional. 106 S. Ct. at 3188-89.

Bowsher, of course, concerned congressional rather than judicial removal power. See id. at 3188. The reasoning of *Bowsher*, however, goes further. The Court's conclusion that the power to remove an officer is by its very nature the power to coerce and control him does not depend upon whether the power is vested in legislative or judicial hands. Just as it is true that "[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws," *id.* at 3187, so too is it true that the Judicial Branch has no general supervisory power over the conduct of executive officials. If, as *Bowsher* held, it follows from Congress' lack of power to execute the laws that Congress may not exercise removal authority (and hence coercive power) over executive officers, the same must also be true of the Judicial Branch.[16] The fundamental underpinning of *Bowsher* is the "'necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others.'" 106 S. Ct. at 3188 (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935)). That essential independence of the branches is as compromised by a judicial, as by a congressional, role in the removal of executive officers.

Nor can it be suggested that the Special Division's power to terminate an office of independent counsel poses no realistic threat of inducing subservience to the court because it was intended for use only in limited circumstances and as a last resort, and has never to date been invoked. Precisely the same argument was made by

[16]Indeed, it would seem that a judicial role in removal of executive officers is even more inimical to the separation of powers than the congressional removal power held unconstitutional in *Bowsher*, for the Constitution itself provides for some congressional role in removal through the impeachment process, *see* 106 S. Ct. at 3190; *id.* at 3212 (White, J., dissenting), but nowhere provides for judicial removal power in any form.

the dissent in *Bowsher*, see 106 S. Ct. at 3211-3213 (White, J. dissenting), and was brushed aside by the majority, *see id.* at 3190-3191. The teaching of *Bowsher* on this point is crystal clear: it is the *potential* for removal, not the likelihood thereof, that, "[i]n constitutional terms," dictates subservience to the branch with removal power. *Id.* at 3191. Performance of executive functions by any officer subservient to another branch is *per se* impermissible even absent proof that such subservience has tangibly affected the performance of his duties. *Id.*[17]

CONCLUSION

The Act's provisions concerning the appointment, removal, and supervision of independent counsel reflect the single animating purpose of removing, insofar as possible, the investigation and prosecution of individuals covered by the Act from Executive Branch control. Even if the individual features of the legislation implementing this scheme could withstand constitutional scrutiny viewed in

[17]The Attorney General's limited removal power, *see* 28 U.S.C. § 596(a), fails to counteract the separation-of-powers problems flowing from the court's independent power to terminate an office of independent counsel. Indeed, the limitations on the Attorney General's removal power are so extensive that they actually tend to reinforce an independent counsel's ultimate dependency upon, and hence subservience to, the Court. Not only is the Attorney General's removal authority limited to misconduct or incapacity, but any attempt to exercise that authority also is subject to *de novo* review by the Special Division of the Court of Appeals, which has authority to reinstate its appointee if it disagrees with the Attorney General's decision on either legal or factual grounds. Although recent amendments to the Act have transferred this review function to the district court, those amendments do not alter what the terms of the Act were during the *Deaver* case. An Independent Counsel's ability to appeal *de novo* to the court — the same authority that originally considered him worthy of appointment — ensures that he will in fact be answerable to no one but the court. The court's removal authority thus guarantees that an independent counsel — an officer performing core executive functions — will be beholden to the court; and *Bowsher* firmly holds that such subservience to another branch by an officer exercising core executive power is constitutionally impermissible.

isolation, their combined effect of stripping the executive of central powers and placing them in the hands of officers beyond Presidential control distorts the scheme of separation of powers too much to be condoned. Flexible though the system of separation of powers may be, it is not infinitely malleable, and "a power definitely assigned by the *Constitution* to one department can neither be surrendered nor delegated by that department, nor vested by *statute* in another department or agency." *Williams v. United States*, 289 U.S. 553, 580 (1933) (emphasis in original).

The Act's legislative history confirms that it was explicitly intended to take inherently executive power out of the hands of the Executive Branch and place it elsewhere. Congress elected to intrude upon the executive domain purportedly because of a perception based upon Watergate that this alteration in our system of government was necessary to prevent conflicts of interest *within* the Executive Branch. This asserted justification is simply insufficient to support the constitutionality of the statute. The appeal to necessity or utility not only overlooks historical evidence demonstrating that special prosecutors within the Executive Branch have been equal to the task of prosecuting crimes at the highest levels of government, but it also, and more fundamentally, ignores this Court's admonition that "policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and . . . sets out just how those powers are to be exercised." *INS v. Chadha*, 462 U.S. at 945. In the final analysis, it also ignores that application of the Act in individual cases threatens the fundamental liberties and individual rights of those citizens targeted by an independent counsel investigation or prosecution. While it is perhaps understandable that in responding to Watergate, Congress overlooked the impact the Act would have on individual citizens, this Court now has before it the proof of such impact in both the Olson investigation, and in the *Deaver* case. Both cases demonstrate the danger to individual citizens of the unaccountable exercise of governmental power outside the structural protections of the constitutional principle of separation of powers.

In our system of government, the solution to fears of conflict of interest or abuse of power is not to reassign powers definitively assigned by the Constitution to a particular branch of government, for "such fears, however rational, do not by themselves warrant a distortion of the Framers' work." *Buckley v. Valeo*, 424 U.S. at 134; *see also United States v. Will*, 449 U.S. 200, 213-216 & n.19 (1981); *Bowsher v. Synar*, 106 S. Ct. at 3193-94. Mistrust of the President or the Presidency cannot, under our Constitution, justify taking from the Chief Executive his power to "take Care that the Laws be faithfully executed."

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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